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No. 94-625

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1994

D&G MARINE MAINTENANCE, B&A MARINE COMPANY and STATE INSURANCE FUND,

Petitioners,

vs.

SPYRIDON KOLLIAS, ELEFTHERIOS GOUVATSOS and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT SPYRIDON KOLLIAS

BERNARD ROLNICK
Counsel of Record
JANE R. GOLDBERG
Of Counsel
Attorneys for Respondent Spyridon Kollias
299 Broadway, Suite 1820
New York, New York 10007
(212) 962-1300

4113
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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TABLE OF CONTENTS

	Page
Statutory Provision Involved	2
Statement of the Case	2
Reasons for Denying the Writ	3
I. This Court's jurisdiction is unwarranted because the issue presented is of limited significance and affects few claimants.	3
II. The Court of Appeals for the Second Circuit properly construed the LHWCA.	4
III. The Second Circuit fully considered and correctly decided, consistent with prior decisions of this Court, that the presumption against extraterritoriality has been overcome.	6
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40 (1989), *reaffirming Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977)	5
Connecticut National Bank v. Germain, 503 U.S. __, 112 S. Ct. 1146 (1992)	5

Contents

Page

Continental Fire & Casualty Insurance Co. v. O'Leary, 236 F.2d 282 (9th Cir. 1956) 7

Cove Tankers v. United Ship Repair, Inc., 683 F.2d 38 (2d Cir. 1982 ..... 4, 5

Cove Tankers Corp. v. United Ship Repair, Inc., 528 F. Supp. 101 (S.D. N.Y. 1981) 4

Director, OWCP v. Perini North River Associates, 459 U.S. 297 6

E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244 (1991) 3, 6, 7, 8

Kelly v. Robinson, 479 U.S. 36 (1986) 8

Kollias v. Bay Tankers, et al., 742 F.2d 1441 (2d Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984) 2, 7

Kollias v. D & G Marine Maintenance, 22 BRBS 367 (1989) 2

Kollias v. D & G Marine Maintenance, 29 F.3d 67 (1994) 1, 3, 5, 6

Reed v. Yaka, 373 U.S. 40 (1963) 5

Reynolds v. Ingalls Shipbuilding, 788 F.2d 264 (5th Cir. 1986), *cert. denied*, 479 U.S. 885 .....4, 5, 8

Contents

	Page
Sale v. Haitian Centers Council, __ U.S. __, 113 S. Ct. 2549 (1993)	7
Smith v. United States, __ U.S. __, 113 S. Ct. 2050 (1993)	5
United States Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365 (1988)	5
Statutes Cited:	
33 U.S.C. § 901, *et seq.*	2
33 U.S.C. § 903(a)	2, 5, 7
33 U.S.C. § 939	5, 7
33 U.S.C. § 939(b)	2, 7
46 U.S.C. § 688	2
Other Authorities Cited:	
Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989)	5, 8
Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 197 (1987)	5
Senate Report at 12-13, 1972 House Report at 10-11	6

Contents

Page

APPENDIX

Appendix A — Relevant Statutory Provision 1a

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENT SPYRIDON KOLLIAS

Respondent, Spyridon Kollias, respectfully requests that this Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit in *Kollias v. D & G Marine Maintenance*, 29 F.3d 67 (1994).

STATUTORY PROVISION INVOLVED

In addition to § 903(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* ("LHWCA"), § 939(b), set forth in Appendix A to this Brief in Opposition, is relevant to the Court's consideration of the Petition.

STATEMENT OF THE CASE

Respondent, Spyridon Kollias, an American ship repairman, suffered a serious and permanent head injury on or about July 20, 1980, on the high seas, while working for the Petitioner, D & G Marine Maintenance, aboard an American flag ship, the supertanker, T.T. WILLIAMSBURG, during a sixty-three day voyage between two United States ports. After Mr. Kollias' injury, the vessel made an unscheduled stop at Curacao. It was not scheduled to travel through the territorial waters of any foreign nation.

Mr. Kollias sought compensation for his injuries from his employer, D & G Marine Maintenance, pursuant to the LHWCA following an adverse verdict in an action brought under the Jones Act, 46 U.S.C. § 688, wherein a jury determined that Mr. Kollias was not a seaman but a ship repairman. *See Kollias v. Bay Tankers, et al.*, 742 F.2d 1441 (2d Cir. 1984) (mem.), *cert. denied*, 469 U.S. 1073 (1984).

Mr. Kollias' claim was denied by the Administrative Law Judge and he appealed the decision to the Benefits Review Board which affirmed, *Kollias v. D & G Marine Maintenance*, 22 BRBS 367 (1989). Mr. Kollias filed a Petition for Review of the Board's decision to the United States Court of Appeals for the Second Circuit. Following oral argument, the Court of Appeals remanded the case to the Board for further factual findings to determine whether the WILLIAMSBURG'S stop at Curacao was

unscheduled and whether the vessel travelled or was scheduled to travel through other foreign territorial waters. Mr. Kollias' case was consolidated with that of Eleftherios Gouvatsos, whose claim had been allowed by the Board, for additional oral argument, during which the Director of the Workers' Compensation Programs of the Department of Labor who is charged by the Secretary of Labor with administering the LHWCA, participated in support of both Mr. Kollias and Mr. Gouvatsos.

Following oral argument on October 21, 1993, the Court of Appeals requested additional briefing on whether the presumption against extraterritoriality applies to the LHWCA and, if it does apply, whether the presumption is overcome under the standard enunciated by this Court of *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (*Aramco*). On July 6, 1994, the Second Circuit reversed the decision of the Benefits Review Board in *Kollias* and affirmed the Board's decision in *Gouvatsos. Kollias v. D & G Marine Maintenance*, 29 F.3d 67 (2d Cir. 1994).

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S JURISDICTION IS UNWARRANTED BECAUSE THE ISSUE PRESENTED IS OF LIMITED SIGNIFICANCE AND AFFECTS FEW CLAIMANTS.

Congress passed the LHWCA in 1927. Since its passage sixty-seven years ago, the question of the Act's application to maritime workers who were injured on the high seas has arisen only five times, including the two cases presently before the Court. Both Circuit Courts which have decided the issue have

held that coverage under the LHWCA extends to the high seas.[1]

The infrequency of cases which have considered the seaward extent of the LHWCA, either in the courts or before the Board, belies the Petitioners' contention that the issue presented is of "signal importance" and will have a far-reaching impact on employees, employers and the insurance industry and, further, negates the Petitioners' misleading use of the District Court's dicta in *Cove Tankers Corp. v. United Ship Repair, Inc.*, 528 F. Supp. 101 (S.D. N.Y. 1981) that the use of ship repairmen on board a vessel at sea is a "recently expanded practice," a comment without any factual basis and disproved by the paucity of claims arising out of the circumstances presented herein.

II.

THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY CONSTRUED THE LHWCA.

The Petitioners suggest that the Second Circuit has misconstrued the clear language and intent of § 903(a) of the LHWCA which defines the geographical scope of the statute. The Second Circuit's analysis, however, is consistent with several basic rules of statutory construction, conveniently ignored by the Petitioners, which support the court's holding that the "navigable waters of the United States" includes the high seas. Reviewing the whole statute, the Second Circuit properly determined that § 939 of the LHWCA, which expressly mandates the establishment of compensation districts to include the high seas

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1. *Reynolds v. Ingalls Shipbuilding*, 788 F.2d 264 (5th Cir. 1986), *cert. denied*, 479 U.S. 885; *Cove Tankers v. United Ship Repair, Inc.*, 683 F.2d 38 (2d Cir. 1982). Respondent Kollias disagrees with the Petitioners' interpretation of *Reynolds* as limited to the facts of that case although the argument supports Respondent's position that such cases are too rare to warrant the exercise of this Court's jurisdiction.

and dictates the venue for judicial proceedings relating to an injury on the high seas, indicates congressional intent that the LHWCA apply extraterritorially, *Kollias*, p. 74. The court then correctly concluded that the phrase "navigable waters of the United States," as used in § 903(a) includes the high seas. *Id.* at 75. The Second Circuit's interpretation of the LHWCA is therefore consistent with this Court's opinion on statutory interpretation as a "holistic endeavor." *Smith v. United States*, __ U.S. __, 113 S. Ct. 2050 (1993), *citing to United States Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (1988), as well as this Court's opinions that the LHWCA must be liberally construed since the dominant intent of Congress was to help longshoremen. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40 (1989), *reaffirming Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); *Reed v. Yaka*, 373 U.S. 40 (1963). *See also*, Eskridge, *Public Values in Statutory Interpretation*, 137 U. Pa. L. Rev. 1007 (1989).

The Petitioners' argument that the continued retention of § 939(b) is merely a congressional oversight ignores this Court's oft-stated presumption that "a legislature says in a statute what it means and means in a statute what it says." *Connecticut National Bank v. Germain*, 503 U.S. __, 112 S. Ct. 1146 (1992). It is revealing that although Congress amended § 939 both in 1972 and 1984, it chose not to delete the high seas venue provision upon which the Second Circuit relied in this case. Thus, while the Petitioners challenge the Second Circuit's definition of "navigable waters of the United States" and its use of legislative history through a selective and misleading attempt to distinguish "high seas" from "navigable waters," both the Second Circuit and the Fifth Circuit are in agreement that the overriding purpose of Congress in enacting the LHWCA would be defeated if it were limited to territorial application. *See Reynolds, Cove Tankers, Kollias, infra; see also*, Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 197 (1987).

In *Kollias, id.,* the Second Circuit relied in part on the legislative history of the 1972 Amendments to the LHWCA as well as this Court's decisions interpreting those Amendments when it concluded that the LHWCA may be applied to the high seas: "A central purpose underlying the LHWCA was thus to create 'a *uniform* compensation system' in which a longshoreman's or harbor worker's coverage did not depend on the site of his injury." *Id.* p. 74, *citing to Director, OWCP v. Perini North River Associates,* 459 U.S. 297, 327 n. 26 (emphasis added) (*quoting* 1972 Senate Report at 12-13, 1972 House Report at 10-11).

Because the Second Circuit's decision correctly applies this Court's substantive holdings concerning the scope and purpose of the LHWCA and construes the statute in a manner congruent with the rules of statutory interpretation enunciated by this Court, the exercise of this Court's jurisdiction is *not* warranted.

III.

THE SECOND CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED, CONSISTENT WITH PRIOR DECISIONS OF THIS COURT, THAT THE PRESUMPTION AGAINST EXTRATERRITORIALITY HAS BEEN OVERCOME.

In *Kollias, supra* at 72, the Second Circuit began its analysis by reviewing the standard set forth by this Court in *Aramco* that "the presumption is not overcome unless there appears 'the affirmative intention of the Congress clearly expressed.' 499 U.S. 248 (*quoting Benz v. Campania Naviera Hidalgo,* 353 U.S. 138 (1957))." The Second Circuit correctly found that in *Aramco,* this Court analyzed not only the clear language of the statute but the notable absence of certain provisions. Further, the Second Circuit noted that this Court "has made clear since *Aramco* that

reference to nontextual sources is permissible." *Id.* at 73, *citing to Sale v. Haitian Centers Council,* __ U.S. __, 113 S. Ct. 2549, 2562 (1993). In *Kollias,* the Second Circuit considered the presumption against extraterritoriality by adhering to this Court's guidelines.

In *Aramco,* this Court rejected as a basis for overcoming the presumption any reliance on broad boilerplate language in the statute, particularly that found in its jurisdictional provision, and specifically found that the failure of Congress to provide any mechanism for the overseas enforcement of Title VII, such as a venue provision, "suggested that Congress did not intend for the statute to apply abroad," *Id.* at 256. In *Kollias,* the Second Circuit focussed specifically on this guideline when it determined that the language of § 939(b) of the LGWCA is not boilerplate but "is specific language directing the venue for a civil action relating to an injury sustained on the high seas." *Id.* at 74.[2] Since the LHWCA contains language, the omission of which was deemed critical by this Court in *Aramco,* the Second Circuit's holding that the language in § 939(b) is "persuasive evidence that Congress intended the LHWCA to apply extraterritorially." *id.* at 74, accurately interprets and applies this Court's decision in *Aramco.*

The fact that Congress has never deleted this high seas venue provision, although it has amended § 939, is also evidence that the Second Circuit's interpretation of the legislative history of the LHWCA does not misapply the standard set forth by this Court, as the Petitioners suggest. While the Petitioners argue that the Second Circuit chose between "competing interpretations" of § 903(a), and therefore violated the principles of this Court, the

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2. Section 939(b), which provides for the establishment of compensation districts to include the high seas, has been construed by the Ninth Circuit as a basis for jurisdiction. *Continental Fire & Casualty Insurance Co. v. O'Leary,* 236 F.2d 282 (9th Cir. 1956).

Second Circuit's interpretation does not in fact conflict with that of the Fifth Circuit, the only other Circuit to decide the issue, *see Reynolds, supra* at 271, nor does it conflict in principle with prior decisions of this Court concerning the central purpose of the LHWCA to provide a uniform system of coverage for longshoreman and harbor workers or with this Court's standard of statutory interpretation which looks " 'to the provisions of the whole law and to its object and policy.' " Eskridge, *supra* at 1038, *citing to Kelly v. Robinson*, 479 U.S. 36, 53 (1986).

Because the Second Circuit applied the presumption against extraterritoriality in a manner consistent with the Court's decision in *Aramco* and subsequent decisions of this Court and does not conflict with the decisions of any other Circuit, there is no basis for the exercise of this Court's jurisdiction.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD ROLNICK
Counsel of Record
JANE R. GOLDBERG
Of Counsel
Attorneys for Respondent
Spyridon Kollias
299 Broadway, Suite 1820
New York, New York 10007
(212) 962-1300

APPENDIX A — RELEVANT STATUTORY PROVISION

33 U.S.C. § 939(b) Administration

> The Secretary shall establish compensation districts, to include the high seas and areas within the United States to which this Act applies, and shall assign to each such district one or more deputy commissioners, as the Secretary deems advisable. Judicial proceedings under Section 18 [collection of defaulted payments] and 21 [review of compensation orders] of this title in respect for any injury or death occurring on the high seas shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such District).